

ESTTA Tracking number: **ESTTA471348**Filing date: **05/08/2012**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

Name	Can't Stop It, LLC		
Entity	Corporation	Citizenship	Minnesota
Address	1689 Stinson Blvd. New Brighton, MN 55112 UNITED STATES		

Attorney information	Bradley J. Walz Winthrop & Weinstine, P.A. 225 South Sixth Street Capella Tower, Suite 3500 Minneapolis, MN 55402 UNITED STATES bwalz@winthrop.com, cmccurdy@winthrop.com, jrezac@winthrop.com, trademark@winthrop.com
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**Registration Subject to Cancellation**

Registration No	3884073	Registration date	11/30/2010
Registrant	Eruption, Inc. 6139 East Allison Circle Orange, CA 92869 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 032. First Use: 2010/09/01 First Use In Commerce: 2010/09/01 All goods and services in the class are cancelled, namely: Energy drinks
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**Grounds for Cancellation**

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
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Attachments	20120508 Petition for Cancellation ERUPTION Registration 3884073.pdf ( 7 pages )(351709 bytes )
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**Certificate of Service**

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Bradley J. Walz/
Name	Bradley J. Walz

Date	05/08/2012
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Can't Stop It, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Cancellation No. _____
Eruption, Inc.,	)	
	)	
Respondent.	)	
	)	_____

**PETITION FOR CANCELLATION**

Can't Stop It, LLC, a Minnesota corporation, having a principal place of business at 1689 Stinson Blvd., New Brighton, MN 55112 ("Petitioner"), believes that it is and will continue to be damaged by the registration of the ERUPTION mark (U.S. Registration No. 3,884,073) on the Principal Register and hereby petitions to cancel the same pursuant to the provisions of Lanham Act § 14, 15 U.S.C. § 1064. The grounds for cancellation are as follows:

1. Petitioner is the record owner of the mark ERUPTION EFFERVESCENT ENERGY ("Petitioner's Mark") in connection with "dietary supplements" in International Class 5, Application Serial No. 85/298,626 ("Petitioner's Application").

2. Eruption, Inc., a California corporation, having a principal place of business at 6139 East Allison Circle, Orange, CA 92869 ("Respondent") is the record owner of U.S. Reg. No. 3,884,073 for the mark ERUPTION in connection with "energy drinks" ("Respondent's Registration").

3. The Examining Attorney assigned to Petitioner's Application has refused registration of Petitioner's Mark under Section 2(d) of the Lanham Act based on Respondent's Registration.

4. On September 28, 2009, Respondent filed an intent-to-use trademark application to register the ERUPTION mark in connection with "energy drinks" in International Class 32, which was assigned Application Serial No. 77/836,633 ("Respondent's Application").

5. On February 23, 2010, Respondent's Application was published for opposition, and on May 18, 2010 the United States Patent and Trademark Office ("USPTO") issued the Notice of Allowance for Respondent's Application.

6. On October 6, 2010, Respondent filed the Statement of Use in connection with Respondent's Application declaring that Respondent's Mark was being used in connection with energy drinks.

7. As its specimen, Respondent submitted a drawing showing how the label for its energy drink would look. Attached as Exhibit A is a true and correct copy of the specimen submitted by Respondent with its Statement of Use.

8. Respondent described its specimen as merely an "[i]mage showing the mark on a container for the goods."

9. The image submitted by Respondent as its specimen is also for an electrolyte and fulvic acid enhanced water.

10. Electrolytes do not directly provide the human body with energy. Rather, electrolytes help the human body to remain hydrated.

11. Fulvic acid also does not directly provide the human body with energy. Rather, fulvic acid helps the human body absorb minerals.

12. Respondent did not submit a specimen with its Statement of Use that showed Respondent's Mark being used in commerce.

13. Respondent did not submit a specimen with its Statement of Use that showed Respondent's Mark being used in connection with an energy drink.

14. Respondent has never sold, offered for sale, or promoted an energy drink under Respondent's Mark.

15. On October 28, 2010 the USPTO accepted Respondent's Statement of Use for Respondent's Application and Respondent's Registration issued on November 30, 2010.

16. Respondent made false statements to the USPTO when it declared that it was using in commerce its ERUPTION mark in connection with energy drinks.

17. Respondent's false statements were material because the USPTO detrimentally relied on Respondent's false statements that Respondent's Mark was being used in commerce and in connection with energy drinks by accepting Respondent's Statement of Use.

18. Respondent knew that it was not using Respondent's Mark in commerce and in connection with energy drinks when it submitted its Statement of Use and intentionally submitted the material false statements to defraud the USPTO.

### **FRAUD**

19. Petitioner restates and incorporates by reference the allegations in Paragraphs 1-18.

20. Respondent made the false statement to the USPTO that it was using Respondent's Mark in commerce when it submitted its Statement of Use.

21. Respondent made the false statement to the USPTO that it was using Respondent's Mark in connection with an energy drink when it submitted its Statement of Use.

22. Respondent's statements were false because Respondent has never used Respondent's Mark in commerce nor in connection with energy drinks.

23. Respondent knew it had never used Respondent's Mark in commerce nor in connection with energy drinks when it filed its Statement of Use.

24. Respondent's false statements were material because the USPTO detrimentally relied on Respondent's misrepresentations by accepting Respondent's Statement of Use.

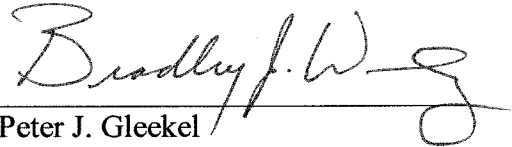
25. Respondent's material false statements were intentionally made to defraud the USPTO and avoid having to pay additional fees to file requests for extensions of time to file an appropriate statement of use.

**WHEREFORE**, Petitioner respectfully requests that the Board sustain its petition for cancellation and:

- 1 Order the cancellation of Registration No. 3884073; and
- 2 Award Petitioner any further relief the Board deems equitable.

Dated: May 8, 2012

WINTHROP & WEINSTINE, P.A.

A handwritten signature in cursive script, appearing to read "Bradley J. Walz", written over a horizontal line.

Peter J. Gleekel  
Bradley J. Walz  
Catlan M. McCurdy

3500 Capella Tower  
225 South Sixth Street  
Minneapolis, MN 55402  
(612) 604-6400 (Telephone)  
(612) 604-6800 (Facsimile)

ATTORNEYS FOR PETITIONER  
CAN'T STOP IT, LLC

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EXHIBIT A



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Reg. No.: 3,884,073  
Registered: November 30, 2010  
For the mark: ERUPTION

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Can't Stop It, LLC,

Petitioner,

v.

Cancellation No. \_\_\_\_\_

Eruption, Inc.,

Respondent.

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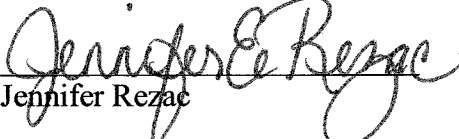
**CERTIFICATE OF SERVICE BY MAIL**

Jennifer Rezac declares that on the 8<sup>th</sup> day of May, 2012, she served by First Class Mail a true and correct copy of the following document:

1. Petition for Cancellation

in the above-captioned action to the last Owner of Record in the TARR database, to-wit:

Ms. Gwen Legge  
President, CEO  
Eruption, Inc.  
6139 East Allison Circle  
Orange, CA 92869

  
Jennifer Rezac